IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

[redacted] 63

NELSON SIBRON,

Appellant,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

BRIEF IN OPPOSITION TO PETITIONER'S APPLICATION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

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INDEX

AUTHORITIES CITED

Cases

Statutes

United States Constitution

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Statement

Petitioner appeals from the order and judgment of the New York Court of Appeals entered on July 7, 1966 affirming an order of the Appellate Term of the Supreme Court of the State of New York, Second Judicial Department rendered on October 15, 1965 affirming a judgment of conviction rendered by the Criminal Court of the City of New York, County of Kings on April 23rd, 1965 convicting the appellant on his plea of guilty of a violation of Sec 3305 of the New York Public Health Law.

The Court of Appeals of the State of New York also affirmed an order denying a motion to suppress evidence

rendered in the Criminal Court of the City of New York, County of Kings, Part 1C by Honorable Michael Kern on March 31st, 1965.

Citation to Opinion Below

The decision of the Court of Appeals is reported at 18 N Y 2d 603. There is no opinion. However the dissent is included as Appendix "A" in petitioner's statement.

The Statute In Question

"Sec. 180-a. Temporary questioning of persons in public places; search for weapons.

1. A police officer may stop any person abroad in a public place whom he reasonably suspects is committing, has committed or is about to commit a felony or any of the crimes specified in section five hundred fifty-two of this chapter, and may demand of him his name, address and an explanation of his actions.

2. When a police officer has stopped a person for questioning pursuant to this section and reasonably suspects that he is in danger of life or limb, he may search such person for a dangerous weapon. If the police officer finds such a weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person. Added L.1964, c. 86, Sec. 2, eff. July 1, 1964."

The Hearing

NELSON SIBRON appeared as a witness in his own behalf and testified substantially as follows:

The defendant admitted that he was a drug addict and that he had a police record containing at least eight prior convictions of violations of the Narcotics Law and charges of Burglary (3, 8).*

The defendant stated that on March 9th, 1965 he was present in a restaurant located at 742 Broadway, in the County of Kings. He was having something to eat when an officer came in and called him out of the restaurant. The defendant accompanied the officer; the defendant was asked if he knew what the officer was looking for. The defendant denied knowledge and the officer proceeded to search him. He did not know the officer and could not remember if he had ever seen the officer before (4). The officer was in full uniform at the time. The officer put his hand in the defendant's pocket and took out ten bags of heroin which the defendant had on his possession at the time. The officer failed to exhibit any search or arrest warrant to the defendant at any time. The defendant stated further that he was alone in the restaurant at the time the officer approached him (5). He had been there approximately ten minutes prior to the officer's arrival (9). The defendant spoke to about two people. They were discussing narcotics. The people to whom the defendant was talking were narcotic addicts (10).

ANTHONY MARTIN was called as a witness by the Court and testified substantially as follows:

He is a member of the New York City Police Department holding the rank of Patrolman. He bears Shield Number 23303 and is assigned to the 90th Precinct. On March 9th

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* Numbers in parenthesis refer to pages of the Hearing Minutes.

the officer had the defendant under observation from the hours of 4:00 P.M. to 12:00 midnight (12, 13). The officer saw him in the vicinity of 742 Broadway for a period of approximately eight hours. During this time the defendant was engaged in conversation with various known addicts (13). The witness knew these addicts personally for some period of time. He knew they were addicted to the use of narcotics by their own admissions and conversations that the witness had had with them over a period of three months (14). The defendant was observed engaging in conversations with six to eight such persons (15). There came a time when the defendant went into the restaurant and the officer followed. When the officer approached, the defendant was talking to three other known addicts inside the restaurant. These three were in addition to the others with whom he had previously conversed.

As he approached, the officer asked the defendant to come outside. The defendant stepped out. At the time the officer approached the defendant in the restaurant, the defendant did not have anything in his hand (16). The officer first observed the defendant reaching for something while the officer was questioning him outside the restaurant (17). When the defendant reached into his pocket, the officer thought that the defendant might be reaching for a weapon. The officer stated to the defendant, "You know what I am looking for," at which point the defendant mumbled something, reached into his pocket, (19) and grabbed something (16). The officer further testified that he just observed the defendant push his hand into his pocket. The witness stated that he did not know what the defendant's intentions were. The officer further stated that although he had observed the

defendant in conversation with six or eight known narcotic addicts, he was not able to overhear their conversations (20).

> "Patrolman Martin: At the same time I told him to take his hand out of his pocket, at the same time I reached in with him and inside his pocket . . . it was a metal tin foil wrapper" (18).
>
> "*Cross Examination by Mr. Kaplan*:
>
> Q. When he reached into his pocket, you didn't think he was reaching for a weapon? A. *I thought he might have been.*
>
> Q. But he came up with a piece of tin foil; didn't he? A. Yes. (19).
>
> Q. Would you say at that time that he reached into his pocket and handed the packets to you? Is that what he did or did he drop the packets? A. He did not drop them. I do not know what his intentions were. He pushed his hand into his pocket.
>
> Mr. Joseph: You intercepted it; didn't you, Officer?
>
> The Witness: Yes". (20) (Emphasis supplied.)

POINT I

The officer's conduct in stopping and subsequently "searching" the defendant was reasonable under the facts.

According to the mandate of Section 180-a of the Code of Criminal Procedure, the officer committed no illegal acts with regard to the defendant's constitutional rights. Section 180-a of the Code of Criminal Procedure provides that a police officer may stop any person abroad in a public place whom he reasonably suspects is committing, has com-

mitted or is about to commit a felony or any of the other specified cirmes, and may demand of him an explanation of his actions. This section goes on to state that when a police officer has stopped such a person and reasonably suspects that he (the officer) is in danger of life or limb, he may search such person for a dangerous weapon. According to the facts in the instant case, the police officer did stop the defendant who was in a public place associating with known narcotics addicts, the defendant himself being a narcotics addict. For purposes of this section it is submitted that the reasonable suspicions for questioning such a person are less than the probable cause that would be necessary to arrest such person. Also see *People* v. *Rivera*, 14 N Y 2d 441, *cert. den.*, 379 U.S. 978, and *People* v. *Entrialgo*, 19 A D 2d 509, *aff'd*, 14 N Y 2d 733. The officer in questioning the defendant observed the defendant mumble and reach into a jacket pocket. The officer saw at midnight, on the street, a metalic glint coming from the suspect's pocket. It is submitted at this point the officer had reasonable cause to suspect that his life might be in danger as he did testify (19).

It need not be pointed out to the Court that the character and emotions of a narcotics addict are somewhat less than stable or predictable. An officer in investigating and questioning past midnight, on a street, in close proximity to the suspect, might have reasonable fear for his own safety.

> "The pertinent circumstances are those of the moment, the actual ones (citing cases). Officers patrolling the streets at night do not prearrange the setting. They do not schedule their steps in the calm of an office. Things just happen. They are required as a matter of duty to act as reasonably prudent men

would act under the circumstances as those circumstances happen" *Bell* v. *United States,* 254 F. 2d 82, at 85, *cert. den.* 358 U.S. 885.

Also see *People* v. *Valentine,* 17 N Y 2d 128.

Luckily for all parties concerned, the defendant did not in fact have a weapon but was in fact turning over to the officer narcotics that he had on his person which were in a package wrapped in silver foil. It is submitted that if the officer was acting under statutory mandate (*People* v. *Norris,* 46 Misc. 2d 44), or the authority given him by this Court under its decision in *People* v. *Rivera,* 14 N Y 2d 441, *cert. den.* 379 U.S. 978, *supra,* to protect his own life and limb and therefore had justifiable cause to reach into the defendant's pocket to stop the progress of any weapon that might have been on the defendant's person, then certainly any contraband that was uncovered in this process was legitimately uncovered (*Harris* v. *United States,* 331 U.S. 145).

There is no indication in the record of any "full blown" search. Courts have condoned such actions by police officers on many other occasions (*People* v. *Pugach,* 15 N Y 2d 65; *People* v. *Rivera,* 14 N Y 2d 441, *cert. den.* 379 U.S. 978; *People* v. *Hook,* 15 N Y 2d 776; *People* v. *Hoffman,* 24 A D 2d 497; *Matter of "Lang",* 44 Misc. 2d 900.

> "We are unable to accept the view which tends to deprecate, if not altogether to reject, as rank suspicion or an educated guess unworthy of acceptance, the experienced police officer's intuitive knowledge and appraisal of the appearance of criminal conduct or action, accomplished or in the course of accomplishment, as one of the factors in reasonable cause

for police action." *People* v. *Peters*, 44 Misc. 2d 470, 473, aff'd 24 A D 2d 989, affd. 18 N Y 2d 238.

Also see *U.S.* v. *Thomas*, 250 F. Supp. 771 (D.C.N.Y., 1966).

POINT II

Section 180-a of the Code of Criminal Procedure is constitutional.

At the inception of this argument it should be pointed out that the Supreme Court of the United States (*Mapp* v. *Ohio*, 367 U.S. 643) and the Court of Appeals of the State of New York (*People* v. *Loria*, 10 N Y 2d 368) have determined that the Fourth Amendment to the Constitution of the United States does not proscribe all searches, but merely unreasonable searches.

(a) A "stop" has been distinguished from an arrest.

There is a long tradition in the law allowing police officers to stop and detain suspects in a manner that does not amount to an arrest. The detained party's constitutional privileges have been held not to arise until an actual arrest has been made. See *United States* v. *Vita*, 294 F. 2d 924; also *United States* v. *Middleton*, 344 F. 2d 78; *United States* v. *Hall*, 348 F. 2d 837; *United States* v. *Cuppola*, 281 F. 2d 340, affd., 365 U.S. 762, notwithstanding this Court's decision in *Miranda* v. *Arizona*, 384 U.S. 436.

The record in the instant case does not indicate what the police officer was looking for. Was he looking for information, or a lead? Was he just trying to determine why this particular party had been malingering in the vicinity of a cafeteria for a period of 8 hours, associating with a large

number of known narcotics addicts? The defendant's conduct can be said to be more than merely suspicious. A police officer on the facts could be said to have a duty to stop and question such a person who was in a public place (*People* v. *Rivera,* 14 N Y 2d 441, *cert. den.,* 379 U.S. 978; *People* v. *Entrialgo,* 19 A D 2d 509, *aff'd,* 14 N Y 2d 733; *Matter of "Lang",* 44 Misc. 2d 900.

As was stated by Mr. Justice Frankfurter:

> "There can be no doubt that a search has as much justification here as it has in the case of an arrest for a crime, where it has been recognized as proper. E.g., *Agnello* v. *The United States,* 269 U.S. 20, 30; 70 L. ed. 145, 148; 46 S. Ct. 4; 51 ALR 409." *Abel* v. *United States,* 362 U.S. 217, 236.

Both on the facts in the instant case, and under the mandate of Section 180-a (Code Crim. Pro.), the officer's conduct was justified and cannot be said to be unconstitutional. He was performing, in the least obnoxious manner, a service to himself and to the appellant in preventing further harm to either from occurring, based on justifiable suspicions as they appeared to him at the time and under the existing circumstances. Certainly, with our hindsight, it would be unfair and unjust to condemn the officer's actions merely because his suspicions were not ultimately justified and no weapon was, in fact, found.

(b) There is no constitutional mandate that directs a search to be conducted solely on the basis of probable cause.

Nowhere in Section 180-a of the Code of Criminal Procedure, or in this Court's decision in *People* v. *Rivera, supra,* or on the facts in the instant case, is there any indication that a "full blown" search was performed upon the person

so involved and subsequently charged with a crime. The appellant defines a "frisk" as a detection by sense of touch. What difference is there if the perception is manual or ocular?

The Statute (§180-a N.Y. Code of Cr. Proc.) doesn't authorize a "full blown" search, but merely provides for a "search for weapons".

> "The Mapp exclusionary rule was imposed upon the states not because of some command inherent in the Fourth Amendment, but rather because the Supreme Court believed that it was the only way the police could be forced to respect the Fourth Amendment. If the police could not obtain a conviction using evidence unlawfully obtained, they would have no incentive to conduct illegal searches. If we keep in mind this *raison d'etre* of the exclusionary rule, we can guard against confusion in the attendant rules that are developed. [A judicial rule rendering evidence produced as the result of a 'frisk' inadmissible would fail to deter the police from 'frisking' suspects believed to be armed, as police 'frisk' for their own protection rather than for the purpose of looking for evidence.] A rule of inadmissibility in such cases could only result in allowing the armed criminal to go free although failing to any meaningful extent to protect individual liberty. The exclusionary rule of illegally obtained evidence cannot be interpreted solely to provide a tidy 'fox hunting' theory of criminal justice. The purpose of the exclusionary rule is to control police misconduct, and in this context it must be applied." *State* v. *Terry*, 214 N E 2d 114, Ohio Court of Appeals, 1966 (and cases cited therein).

The constitutionality of this type of conduct by a police officer has also been upheld in the State of California in a long line of decisions following *People* v. *Cahan*, 44 Cal. 2d 434, 282 P. 2d 905.

Also see N.H. Laws Sec. 594: 2-3 (1955); R.I. Gen. Laws Ann. Sec. 12-7-1 (1965); Del. Code Ann. Tit. 11, Sec. 1902 (1953). Similar legislation has also been enacted in Hawaii, Massachusetts and the City of Miami, Florida. Rev. Laws of Hawaii, Tit. 30, Ch. 255, Secs. 4-5 (1955); Mass. Gen. Laws Ch. 41, Sec. 98 (1961); Code of City of Miami, Florida, Sec. 43-46 (1957), as amended by Ord. No. 7, 367 (1965).

In deciding the law in the State of New York the Court of Appeals of the State of New York in the case of *People* v. *Peters*, 18 N Y 2d 238 stated:

> "In *Rivera* we divided the problem into two stages: the legality of the detention and the legality of the frisk. With regard to the former, we noted (p. 444) that it is the business of police to *prevent* crime and that prompt inquiry into 'suspicious or unusual street action' is an indispensable police power 'And the evidence needed to make the inquiry is not of the same degree or conclusiveness as that required for an arrest.'"

And in the *Rivera* case the Court of Appeals of the State of New York further stated:

> "The authority of the police to stop defendant and question him in the circumstances shown is perfectly clear. The business of the police is to prevent crime if they can. Prompt inquiry into suspicious or unusual street action is an indispensable police power in the orderly government of large urban communities . . . (444)

"the evidence needed to make the inquiry is not of the same degree or conclusiveness as that required for an arrest. The stopping of the individual to inquire is not an arrest and the ground upon which the police may make the inquiry may be less incriminating than the ground for an arrest for a crime known to have been committed . . . (445)

"The validity of the initial stopping and inquiry by police under suspicious circumstances is implicit, too, in the recent decision of this court (*People* v. *Entrialgo*, 14 N Y 2d 733) . . . (445)

"Indeed, the right of the police to stop and question the defendant in such circumstances as those disclosed by this record was recognized by common law . . . (445)

"The answer to the question propounded by the policeman may be a bullet; in any case the exposure to danger could be very great. We think the frisk is a reasonable and constitutionally permissible precaution to minimize that danger . . . (446)

"And as the right to stop and inquire is to be justified for a cause less conclusive than that which would sustain an arrest, so the right to frisk may be justified as an incident to inquiry upon grounds of elemental safety and precaution which might not initially sustain a search." (447) *People* v. *Rivera*, 14 N Y 2d 441, 444, 445, 446, 447.

And, as the Court of appeals of the State of New York further stated in the *Pugach* case:

"The Fourth Amendment, as we know, proscribes 'unreasonable' searches and seizures. The determination of unreasonableness depends on surrounding facts and circumstances and, as we have said, 'in-

volves a balancing of interests.' We recently dealt with the reasonableness of a routine 'frisk' made by police officers as an incident in the detention of a pedestrian whose actions had aroused the officers' suspicions and whether the fully loaded gun thus obtained should have been suppressed. Under the facts adduced, we were satisfied that a 'frisk' of a defendant was a reasonable and constitutionally permissive precaution to minimize the danger to a policeman who is trying to determine whether a crime has been or is about to be committed; in other words, that a 'frisk' is distinguishable from a constitutionally protected search. We took pains to point out that the right to 'frisk' is justified as an incident to an inquiry upon grounds of safety and precaution which might not initially sustain a search (*People* v. *Rivera*, 19 A D 2d 863, revd. 14 N Y 2d 441)." (*People* v. *Pugach*, 15 N Y 2d 65, at 69.

POINT III

Petitioner's application for leave to appeal to the Supreme Court of the United States should be denied.

Dated: Brooklyn, New York,
January 1967.

Respectfully submitted,

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